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In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANK KOWALIK, JR. AND KAREN KOWALIK,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
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Washington, D.C. 20530

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Petitioners seek review of the decisions below enforcing three internal revenue summonses requiring separate financial institutions to produce their business records relating to their accounts and enforcing a fourth summons requiring Frank Kowalski's employer, Income Realty and Mortgage, Inc., to turn over certain of its records pertaining to his employment.

The pertinent facts may be summarized as follows: In 1978, Special Agent Kenneth Batson of the Criminal Investigation Division of the Internal Revenue Service commenced an investigiation of petitioners' income tax liabilities for 1976 and 1977. In furtherance of the investigation, Special Agent Batson issued Internal revenue summonses to three financial institutions in the

Denver area seeking records maintained on accounts with petitioners. Notices of the summonses were sent to petitioners, and, upon their instructions, the financial institutions refused to comply. At approximately the same time, Special Agent Batson issued a summons to Income Realty and Mortgage, Inc., directing it to produce records concerning Mr. Kowalik's employment. In accordance with petitioners' directions, Income Realty likewise refused to comply (Pet. App. 11).

The government and Special Agent Batson thereupon brought this action to enforce the summonses in the United States District Court for the District of Colorado. In declarations filed with the district court, Agent Batson stated that he was conducting an investigation of petitioner's income tax liabilities for 1976 and 1977, and that the summoned records, which were not in the government's possession, were required for his investigation. The district court permitted petitioners to intervene in the proceeding and ordered the summonses enforced. The court of appeals affirmed (Pet. App. 9-11).

1. Section 7601 of the Internal Revenue Code of 1954 requires the Secretary of the Treasury and his delegates to inquire as to the correct tax liabilities of taxpayers. See *United States* v. *LaSalle National Bank*, 437 U.S. 298, 308 (1978); *United States* v. *Bisceglia*, 420 U.S. 141, 145 (1975). To enable the Secretary effectively to discharge that responsibility, Section 7602 authorizes the Secretary to issue internal revenue summonses to taxpayers and third parties requiring them to produce papers and records that are relevant to such inquiries. *United States* v. *Bisceglia*, *supra*, 420 U.S. at 145-146; *Donaldson* v. *United States*, 400 U.S. 517, 524 (1971).

Contrary to petitioners' contention (Pet. 4-5), a summons seeking records owned or in the possession of a

third party does not violate the taxpayer's Fifth Amendment privilege against compulsory self-incrimination. *Fisher* v. *United States*, 425 U.S. 391, 397-399 (1976); *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 55 (1974); *Couch* v. *United States*, 409 U.S. 322, 327-329 (1973). As petitioners suggest (Pet. 4), it may well be that the information in third party records at issue here will lead to a criminal prosecution of petitioners. Cf. *Couch* v. *United States*, *supra*, 409 U.S. at 329. But a violation of the Fifth Amendment does not occur unless some compulsion is directed at the individual to obtain the incriminating information from him. *E.g.*, *Fisher* v. *United States*, *supra*, 425 U.S. at 397-399; *Couch* v. *United States*, *supra*, 409 U.S. at 327-329. Here, the legal compulsion is directed at the third party financial institutions and the employer, not the person under investigation.[1]

2. Petitioners further argue (Pet. 2, 4) that the summonses are unenforceable because they were in aid of a criminal investigation and that the Internal Revenue Service is attempting to "achieve criminal ends under the guise of civil process."

To be sure, the information sought by the summonses may be relevant to the question whether petitioners are subject to any criminal penalties imposed by the Internal Revenue Code. See *Couch* v. *United States*, *supra*, 409 U.S. at 326. But as this Court recognized in *United States* v. *LaSalle National Bank*, *supra*, where the Internal Revenue Service has not made a recommendation for

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[1]Petitioners assert (Pet. 5-6) that the government cannot maintain an action to enforce a summons "in any court". But it is plain that the district courts have authority to compel compliance with internal revenue summonses. See 26 U.S.C. 7402(b), 7604(a). See also *Couch* v. *United States*, 409 U.S. 322 (1973); *Donaldson* v. *United States*, 400 U.S. 517 (1971).

criminal prosecution to the Department of Justice, the summons is enforceable unless the taxpayer can show that the Service has abandoned the collection of a civil tax liability. They thus failed to carry their burden of demonstrating that the summonses were not issued in good faith. *United States* v. *LaSalle National Bank*, *supra*, 437 U.S. at 313-317. See also *Donaldson* v. *United States*, *supra*, 400 U.S. at 532, 535-536.

3. Finally, petitioners argue that they were entitled to oral argument in the court of appeals as part of the required adversary hearing. But it is well settled that the courts of appeals are not required to hear oral argument in every case. See, *e.g.*, *George W. B. Bryson & Co.* v. *Norton Lilly & Co.*, 502 F. 2d 1045, 1050-1051 (5th Cir. 1974); *NLRB* v. *Local No. 42, Int. Ass'n of Heat & F.I. & A. Wkrs.*, 476 F. 2d 275, 276 (3d Cir. 1973); *United States* v. *Gregg*, 393 F. 2d 722, 723 (4th Cir. 1968).

As for petitioners' assertion (Pet. 5) that they were not afforded an oral hearing in the district court, the court's order of April 5, 1979, recites (Pet. App. 18) that it was entered after a hearing. If the hearing was inadequate, petitioners should have raised any objection either in the district court or the court of appeals. They did not do so. There is accordingly no basis for any claim of prejudice as a result of any defect in the hearing afforded petitioners in the district court. See *Communications Comm'n* v. *WJR*, 337 U.S. 265, 275-277 (1949).[2]

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[2]Petitioners also failed to challenge Special Agent Batson's declarations. In these circumstances, no evidentiary hearing was required. See *United States* v. *Garden State National Bank*, 607 F. 2d 61, 71 (3d Cir. 1979); *United States* v. *Morgan Guaranty Trust Co.*, 572 F. 2d 36, 42 (2d Cir.), cert. denied, 439 U.S. 822 (1978).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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